Exploiting Image

Exploiting Image: Putting a Case for the Legal Regulation of Publicity Rights in the UK

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Now that the confetti has settled after the royal wedding, and Prince William and Princess Catherine have launched their married life together, it is possible to take time to consider one aspect of the big day: the publicity.[1] Whether one was an avid watcher, a casual bystander, or a determined avoider of the wedding itself, it was impossible not to notice the many column inches dedicated to the wedding and the surrounding merchandising and commercial activity.[2] Thus, even if one does not possess a "Kate and Wills" commemorative mug or tea-towel, one will almost certainly have read about the demand for (and resistance to) such items.[3] Similarly, while one may not have travelled to London to wave flags in the streets in a patriotic fashion, the impact of the wedding on tourism in the UK has certainly generated comment and speculation.[4]

While much of this is "publicity" in its broadest sense, it does also highlight some specific issues regarding publicity rights: the idea that one's name, image and reputation have a value in the media, or for merchandise, or for the promotion of goods and services. It is fair to speculate that if the celebrity royal couple were merely a celebrity couple, they would have been able to negotiate a considerable deal for the exclusive right to cover the event, following the examples of David and Victoria Beckham, Catherine Zeta Jones and Michael Douglas and, most lucratively, Wayne Rooney and Coleen McLoughlin.[5] One royal couple did

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[1] There is another royal wedding taking place this year, between Zara Phillips and Mike Tindall, but it is a considerably more low-key affair, in contrast with that of Prince William and Catherine Middleton.

[2] A Google search for "royal wedding" in April 2011 returned 233,000,000 results.

[3] Websites abound offering wedding merchandise and souvenirs, inclouding the official items available through the Royal Collection: http://www.royalcollectionshop.co.uk/Official-Royal-Wedding-Merchandise/products/33/ However, not all of the souvenirs are celebratory: see the royal sickbag produced as an "antidote to the multiplicity of kitsch memorabilia" http://www.bbc.co.uk/news/uk-12551726 . See also a feature on the investment potential of royal wedding souvenirs: http://www.guardian.co.uk/money/2010/nov/20/royal-wedding-souvenirs .

[4] The tourism industry in the South East of England is predicted to benefit from a "bumper year" as a result of the Royal wedding: http://www.bbc.co.uk/news/uk-england-12861176 .

[5] Details for these and other celebrity weddings are: David and Victoria Beckham (to OK! in 1999 for £1million); Michael Douglas and Catherine Zeta-Jones (to OK! in 2000 for £1million); Jordan and Peter Andre (to OK! in 2005 for £2million); Ashley Cole and Cheryl Tweedy (to OK! in 2006 for £1million); and Wayne Rooney and Coleen McLoughlin (to OK! in 2008 for £2.5million). Since official details of such arrangements are not published, definitive authority is hard to produce: all details taken from BBC online or Wikipedia.

negotiate such a magazine deal, but the exclusive photographs of the Queen which resulted proved somewhat controversial, and led to an apparent dictat from Her Majesty not to repeat the error.[6] Weddings have even provided an opportunity for promotion activities, as Anthea Turner could testify: her promotion of Cadbury's Flakes at her wedding reception was arguably not her greatest moment.[7] And while wedding merchandise is typically restricted to souvenirs of royal weddings, general merchandise of music, film and sports stars – calendars, mug, t-shirts and so on – is certainly popular with their fans.

A review of the popular methods of exploiting image (whether wedding-related or not) reveals that there are three main ways in which publicity is sought. The first is where an individual agrees to allow an entity (frequently a newspaper or a magazine) access to a particular area of his life, typically for a fee. As with the examples above, this may relate to a wedding or other personal milestone (births and christenings are also popular). Alternatively, the media coverage can comprise an exclusive "inside" story from an individual caught up in a high-profile current event.[8] This type of story goes beyond media coverage of the news, and seeks to provide additional details derived from exclusive interviews. It also provides one example of where publicity can be exploited by non-celebrities, demonstrating that publicity is not exclusively the preserve of the famous or those in the non-stop reality show circus. Such media "exclusives" are weekly events, as evidenced by the contents of the average news-stand. This supply and demand for gossip and information can be thought of as the "media information" use.

The second category of exploitation is the "promotion" use. This arises where an individual agrees to endorse, support or promote a particular product or service: he "tells the relevant public that he approves of the product or service or is happy to be associated with it. In effect he adds his name as an encouragement to members of the relevant public to buy or use the service or product."[9] This use of name and image typically comprises more than the provision of modelling services: the supplier wishing to benefit from this support will

[6] When Peter Phillips married Autumn Kelly in 2008, exclusive coverage was sold to Hello! magazine (issue number 1022, May 2008), for £500,000. According to an article in the Telegraph later that month, the Queen was not impressed: http://www.telegraph.co.uk/news/uknews/theroyalfamily/2004590/Queen-halts-celebrity-magazine-deals-after-Peter-Phillips-Autumn-Kelly-Hello-wedding.html

[7] For a brief review of "Flakegate" see http://en.wikipedia.org/wiki/Cadbury_Snowflake .

[8] The publicist Max Clifford makes a living from brokering such deals: http://en.wikipedia.org/wiki/Max_Clifford .

[9] *Irvine v Talksport Ltd* [2002] 1 WLR 2355, at para 9, per Laddie J.

usually have chosen a specific individual not for his modelling abilities (or not exclusively so) but for the added value provided by his public status or reputation. Celebrity status or reputation therefore apparently has a role to play in most promotion use.

What is critical in this use is that the individual advertises or endorses the products or services *of another party*, rather than himself or his own products. There may be a link between the individual's fame and the goods or services he is promoting, in which case it is sometimes referred to as a "tools of the trade" deal. This is the case, for example, with Tiger Woods (golf professional) and Nike (sports equipment). Alternatively, the supplier may favour a "non-tools" connection,[10] and simply wish to enjoy some "reflected glory" from the particular reputation or popularity of the individual in question, without there being a link between the activities of the individual and the product or service to be promoted. Thus, David Beckham's star status was valuable to Pepsi without him being involved in the soft drinks industry,[11] while Cheryl Cole has had a high profile as the face of L'Oreal Paris for nearly two years.[12] Here, the individual helps to grab the public's attention and thereby promote the goods or services of the party in question.[13]

The final use of image that can be identified is where an individual agrees to produce or authorise production of goods which carry his name and/or image. Common examples of these "mere image carriers", as the Trade Marks Registry has termed them,[14] include posters, calendars, t-shirts and mugs. Here, the goods are not being bought solely because the purchaser wishes a new mug, nor are they being sold as trade marked items in the sense that the purchaser is specifically keen to buy a mug from a certain manufacturer as identified by its trade mark. Instead, they are seen as "badges of loyalty":[15] souvenirs or indicia of support for, or interest in, the individual who features on the product. An example of merchandising was given in (the non-merchandising case of) *Irvine v Talksport*, where reference was made to "the sale of memorabilia relating to the late Diana, Princess of Wales. A porcelain plate

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[10] *Ibid*.,.
[11] As at 2004, Beckham's deal with Pepsi was apparently worth £3million: Andy Milligan, *Brand it Like Beckham* (Cyan, 2004), at 120.
[12] See for example http://www.bbc.co.uk/news/uk-12551726 .
[13] Beverley-Smith *et al* identify this "grabbing" of attention as a separate category in its own right: *Privacy, Property and Personality* (CUP, 2005), at 2. For present purposes, the grabbing of attention will be treated as part of the broader category of promotion, whether done in a "tools" or "non-tools" context.
[14] See G Black (published as G Davies), "The cult of celebrity and trade marks: the next instalment" (2004) 1:2 *SCRIPT-ed* 230.
[15] As used in *Arsenal v Reed* [2003] 3 All ER 865.

bearing her image could hardly be thought of as being endorsed by her, but the enhanced sales which may be achieved by virtue of the presence of the image is a form of merchandising."[16] Her son's wedding has provided another clear example of this merchandising activity, both through authorised and unauthorised suppliers. This use of an individual's image can be thought of as "merchandising" use.

Merchandising may involve products which are either a "pure representation" (for example, posters) or a "utilitarian" item (for example, t-shirts or calendars). The significant distinction between the promotion use outlined above and the merchandising use is the difference already alluded to, between, respectively, image as a marketing tool to promote goods or services and image as the product itself. In merchandising, the individual arguably becomes the product: one buys the "Kate and Wills" mug to show one's allegiance and to share in the event, rather than simply because one needs a new mug.[17]

Together, the media information, promotion and merchandising uses can be seen as the most commonly cited (and evidenced) types of publicity activity. In each case, however, there must be "public" use: where the use of the image or identity is exclusively private, there will be no element of publicity to be indicted.[18] The requirement for public use is implicit in each use: none of these publicity uses could be achieved by keeping the relevant publication, promotion or merchandise private. However, this requirement for public use does not equate to commercial or for-profit use since a charity, for example, could make use of an individual's image and identity to promote its cause without directly raising income.

Whether the use is media information, promotion or merchandising, there will always be some element of the individual which is exploited. The subject matter of the use is therefore as important as the manner in which the publicity is sought. In most cases, the obvious element to be used is the individual's image – frequently without a name or any other identifying factor. However, names, signatures, and even abstract indicia of the individual have all been exploited. As Professor McCarthy has observed:

> What aspects of human identity does the right of publicity protect? It protects anything by which a certain human being can be identified. This covers everything: personal names, nicknames, stage and pen names, pictures, and persona in a role or

[16] *Irvine v Talksport* [2002] 1 WLR 2355, at para 9, per Laddie J.
[17] C Colston and K Middleton, *Modern Intellectual Property Law* (2nd ed, 2005) at 632.
[18] Private use may of course breach a different legal right, in which case it will be protected by that right.

> characterization. It can also include physical objects which identify a person… And the Bette Midler decision reaffirms that a person can be identified by voice.[19]

Moreover, "a person's characteristic dress may be as much a part of his personality as his face".[20] Consequently, even where the individual cannot be identified in person but only from surrounding factors, such as the individual's clothes or accessories, there is sufficient identification to constitute use of the individual's image.[21]

One element which is common to many of the examples of publicity is that the individual in question is famous. David Beckham and Cheryl Cole provide more than just an attractive face for advertisements:

> We identify with and buy into celebrities for the same reasons we buy into brands. They add colour and excitement to our life. They provide a promise or a reassurance of a particular experience. We admire what they do, how they look or what they represent. They offer a shared frame of reference that enables us to bond with other people.[22]

The underlying element which apparently creates the value and the attractiveness of a image is the recognisability of the individual, and this stems from the celebrity's reputation.[23] Accordingly, in the majority of examples considered, the physical manifestation of the individual – through image, name or indicia – is necessary to harness the underlying "asset" which is being exploited: reputation.

Thus, publicity rights can be thought of as an amalgam of image and reputation, exploited by way of the media, promotion and merchandising uses, and which typically pertain to famous individuals – but need not do so, as the "real life" exclusives demonstrate.

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[19] JT McCarthy, 'Public Personas and Private Property: The Commercialization of Human Identity' (1989) 79 TMR 681, at 689.

[20] David Vaver, 'What's Mine is Not Yours: Commercial Appropriation of Personality under the Privacy Acts of British Columbia, Manitoba and Saskatchewan' (1981) 15 *University of British Columbia Law Review* 241, at 274.

[21] David Vaver, 'What's Mine is Not Yours: Commercial Appropriation of Personality under the Privacy Acts of British Columbia, Manitoba and Saskatchewan' (1981) 15 *University of British Columbia Law Review* 241, at 274, see also *Athans v Canadian Adventure Camps Ltd* (1977) 17 OR (2d) 425 and S Martuccelli, 'An Up-and-Coming Right – the Right of Publicity: its Birth in Italy and its Consideration in the United States' [1993] Ent LR 109.

[22] Andy Milligan, *Brand it Like Beckham* (Cyan, 2004), at 31. This echoes the message which is drawn out time and again in the works of Madow and Coombe, amongst others: M Madow, 'Private Ownership of Public Image: Popular Culture and Publicity Rights' (1993) 81 *Cal L Rev* 125; Coombe, *The Cultural Life of Intellectual Properties* (1998) ch 2.

[23] It is typically recognisability which is important, rather than whether the reputation or association is good or bad.

In the US, the culture of publicity has led to extensive publicity rights and litigation. Celebrities can protect their interests through statutory and common law rights of publicity[24] and the tort of appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[25]

In the UK, a very different picture emerges. Although there is widespread evidence of the commercial exploitation of image and identity, through the three publicity uses outlined above, there is no corresponding legal protection. With no statutory or common law publicity rights, claimants have turned to a range of possible alternatives, in an attempt to "shoe-horn" their claims into the best available legal right. Actions have included passing off,[26] privacy,[27] and trade marks.[28] It is not the purpose of this article to explore these options, except to note that the many criticisms of these approaches are typically justified.[29] Instead, I would like to examine whether a dedicated publicity right can be justified. While the celebrities who enhance their income from such practices would unsurprisingly tend to support it, it is not clear that the creation of a dedicated publicity right would meet with unqualified support. Indeed there is considerable academic criticism of any move towards a publicity right in the United Kingdom.[30]

However, where publicity exploitation makes use of an individual's image and identity – as it invariably does – there is a risk of harm to the individual if that use is unauthorised. Failure

[24] The leading case, credited with creating the right of publicity in the US, is *Haelan Laboratories v Topps Chewing Gum* (1953) 202 F.2d 866. See also MB Nimmer, 'The Right of Publicity' (1954) 19 *Law & Contemp Probs* 203; JT McCarthy, *The Rights of Publicity and Privacy*, 2nd edn (United States, West Group, 2001); and M Madow, 'Private Ownership of Public Image: Popular Culture and Publicity Rights' (1993) 81 *Cal L Rev* 125.
[25] William Prosser, 'Privacy' (1960) 48 *Cal L Rev* 383.
[26] *Irvine v Talksport Ltd* [2003] 2 All ER 881, [2003] EWCA Civ 423. For an earlier, unsuccessful, action, see *Lyngstad v Anabas Products Ltd* [1977] FSR 62.
[27] *Douglas v Hello! (No 3)* [2006] QB 125. Note that this citation refers to the Court of Appeal decision, which was the final one as regards the Douglases and their privacy concerns: the appeal to the House of Lords concerned issues of breach of confidence between OK! and Hello!: *OBG & Others v Allan & Others* [2008] 1 AC 1.
[28] For example, *Elvis Presley Trade Marks* [1999] RPC 567. See also G Black (published as G Davies), "The cult of celebrity and trade marks: the next instalment" (2004) 1:2 *SCRIPT-ed* 230.
[29] In particular, see Huw Beverley-Smith, *The Commercial Appropriation of Personality* (CUP, 2002); and Hazel Carty, 'Advertising, Publicity Rights and English Law' (2004) *Intellectual Property Quarterly* 209.
[30] Ibid. See also Christina Michalos, '*Douglas v Hello*: The Final Frontier' (2007) *Entertainment Law Review* 241, Christina Michalos, 'Image Rights and Privacy: After *Douglas v Hello!*' (2005) *European Intellectual Property Review* 384, Jonathan Morgan, 'Privacy, Confidence and Horizontal Effect: "Hello" Trouble' (2003) 62 *Cambridge Law Journal* 444. As regards criticisms of the US approach, see Michael Madow, 'Private Ownership of Public Image: Popular Culture and Publicity Rights' (1993) 81 *California Law Review* 125.

to allow individuals to control the use of their image and identity risks infringing their personal autonomy. Autonomy is the notion that individuals should be free to make their own life choices, with as little regulation from external sources as possible, subject to the need for each individual to respect the self-respect and bodily integrity of others.[31] The exercise of autonomy enables each individual to take responsibility for his own life choices and pursuit of the 'good life'.[32] Such is the importance of autonomy in the Western legal tradition that Professor MacCormick has said '[i]f there is any fundamental moral value, that of respect for persons as autonomous agents seems the best candidate for that position'.[33] The role of law is, in part, 'to prevent the violation of a citizen's autonomy, dignity and self-esteem'.[34]

The critical importance of image for autonomy has recently been emphasised by a decision of the European Court of Human Rights, *Reklos v Greece*.[35] The action was raised by the parents of a child, claiming a breach of their article 8 right to private and family life. The day after the birth of their son, the applicants (his parents) were offered the opportunity to purchase photographs of him, taken by the professional photographer in the private clinic. The photographs were taken face-on to the baby. Not only had the parents not consented to the taking of these pictures, but they also revealed that the photographer had been into the sterile unit where their son was being treated, despite the fact that access to the unit was restricted to doctors and nurses. The parents complained to the clinic management, but their request that the negatives be handed over was refused. After exhausting their domestic remedies in Greece, they then raised an action under the ECHR.

Although this case is very much a claim under article 8 for invasion of private life (and, critically, there was no attempt to publish or disseminate the photographs[36]), the opinion of the ECtHR is highly relevant. The question of "private life" (not privacy) includes "the right to identity and the right to personal development, whether in terms of personality or of personal autonomy, which is an important principle underlying the interpretation of the

[31] And also (although of less relevance in this context) to avoid causing damage to public institutions. See N MacCormick, *Legal Right and Social Democracy* (Clarendon Press, 1982, reprinted 1986) 37.
[32] See N MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford University Press, 2007) ch 14, especially at 249.
[33] N MacCormick, *Legal Right and Social Democracy* (Clarendon Press 1982, reprinted 1986), at 35.
[34] *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB), para [7].
[35] *Reklos v Greece* Application No 1234/05, 15 April 2009.
[36] The fact that there had been no publication was advanced as a defence by the Greek government, but rejected.

article 8 guarantees."[37] Autonomy therefore lies at the heart of the wider article 8. In a key passage, the Court stated:

> *A person's image constitutes one of the chief attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from his peers. The right to the protection of one's image is thus one of the essential components of personal development and presupposes the right to control the use of that image.* Whilst in most cases the right to control such uses involves the possibility for an individual to refuse publication of his or her image, it also covers the individual's right to object to the recording, conservation and reproduction of the image by another person. As a person's image is one of the characteristics attached to his or her personality, its effective protection presupposes, in principle and in circumstances such as those of the present case, obtaining the consent of the person concerned at the time the picture is taken and not simply if and when it is published. Otherwise an essential attribute of personality would be retained in the hands of a third party and the person concerned would have no control over any subsequent use of the image.[38]

This is a very strong statement of the importance of an individual's image and its significance for personal development (and thus autonomy), with the corresponding need to ensure that it is protected from unauthorised use.

How does this understanding of autonomy and dignity apply to publicity rights? Central to the exercise of autonomy and dignity are the notions of personal choice and control, and these are the very notions which are jeopardised where there is no right of publicity. Lacking a right of publicity, an individual can attempt to control when and where his image – and his very identity – is used, and by whom, but there is no certainty of success. Autonomy and dignity operate to justify a right for each individual to control the use of his image and identity.[39]

Control, and thus autonomy, lies at the heart of McCarthy's justification of a publicity right:

> the [justification] that appeals the most to me is the simplest and most obvious. It is the natural right of property justification. It is an appeal to first principles of justice. *Each and every human being should be given control over the commercial use of his or her identity.* Perhaps nothing is so strongly intuited as the notion that my identity is mine – it is my property, to control as I see fit. Put simply, my identity is "me".

[37] *Reklos v Greece* Application No 1234/05, 15 April 2009, at para 39, references omitted.
[38] *Reklos v Greece* Application No 1234/05, 15 April 2009, at para 40, reference omitted, emphasis added.
[39] Interestingly, Carty's main objection to this justification is that it is "not part of the Anglo-American tradition" (H Carty, "Advertising, publicity rights and English law" (2004) *IPQ* 209, at 250), but autonomy is increasingly relevant in English law, thanks in part to the influence of the ECHR. See *Mosley v News Group Newspapers* [2008] EWHC 1777 (QB), para 7; *Wood v Commissioner of Police for the Metropolis* [2009] EWCA Civ 414, at para 20; *Reklos v Greece* Application No 1234/05, 15 April 2009.

> The existence of a legal right to control identity would seem to be essential to any civilized society.[40]

This is a powerful and emotive argument, and underlies the "natural rights of property" school of thought.[41] As the added emphasis in the above quotation shows, McCarthy identifies *control of identity* as the core notion to be protected by a publicity right, and this is inherent in the rights to autonomy and dignity.[42]

McCarthy's justification is made in the context of a Common law jurisdiction, and there is even greater evidence of the primacy of the individual and personal choice in Civilian jurisdictions. Neethling starts his review of personality rights by noting that they "recognize a person as a physical and spiritual-moral being and guarantee his enjoyment of his own sense of existence."[43] In the context of German law, Beverley-Smith *et al* explain that §823 I BGB, which protects absolute subjective personality rights,[44] is "based on a theory of subjective rights which has its roots in the legal philosophy of Immanuel Kant and the legal theory of Savigny: subjective rights delimit certain spheres in which each individual can act according to his or her free will."[45]

Not only do autonomy and dignity require each individual to have control of his life and his life choices, but they also illustrate the harm caused when that right to control is denied, unless there is a legitimate reason for such denial in the wider public interest. Where an individual is unable to control the use of his image and identity, there is no right for the individual to give or withhold such consent. Image and identity therefore become freely available for use by others,[46] without the need to seek the consent of the individual.

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[40] JT McCarthy, 'Public Personas and Private Property: The Commercialization of Human Identity' (1989) 79 TMR 681, at 685, emphasis added.
[41] I am not seeking to advocate a natural right of property for publicity however: whether or not property is indeed the most appropriate legal classification has been examined elsewhere and is beyond the scope of this article.
[42] *Reklos v Greece* Application No 1234/05, 15 April 2009. Also O Weber, "Human dignity and the commercial appropriation of personality: towards a cosmopolitan consensus in publicity rights?" (2004) 1:1 SCRIPT-ed 160.
[43] J Neethling, "Personality Rights" in Jan M Smits (ed), *Elgar Encyclopaedia of Comparative Law* (Cheltenham, Edward Elgar, 2006), at 530.
[44] Comprising the rights to life, body, health, freedom, property or "any other right of another person". See §823 I BGB and the analysis thereof in Beverley-Smith *et al*, *Privacy, Property and Personality* (CUP, 2005) at 97.
[45] *Ibid*., at 97, footnote omitted.
[46] N MacCormick, *Institutions of Law: An Essay in Legal Theory* (OUP, 2007), at 126.

Yet a specific wrong occurs where the individual's image and identity is used without his consent. Spence analyses the consequences of unpermitted use of a trader's brand name in the context of passing off.[47] Although the current discussion does not focus on use of corporate identity in passing off, the points he makes hold good. The starting point for Spence's argument is that where a company uses a rival trader's brand without the consent of that trader, it is making an untruthful representation and "a community that claims to value truthfulness, must be reluctant to allow one party to suffer harm, or indeed another party to benefit, as a consequence of an untruthful statement."[48]

In a passionate claim, Spence emphasises the attack on autonomy that results where unauthorised (and therefore "untruthful") use is made of the rival brand, such that it becomes a mask that is used by the unauthorised exploiter:

> The maintenance of a society of autonomous persons must involve at least some prevention of others, unauthorised, speaking on their behalf. In this way, the wrong in passing off not only parallels the wrong in plagiarism, it also somehow parallels the wrong in torture. As De Grazia has pointed out, one of the wrongs involved in torture is the appropriation of another's voice, the unauthorised assumption of the right to speak on his behalf. It is arguably precisely this right that is involved when one trader claims to speak through the identity of even a corporate rival.[49]

The claim here is that just as torture is used to subjugate the voice of the victim to that of the torturer, so the unauthorised use of the brand suppresses the brand owner's voice and imposes upon his brand the voice or "message" of the unauthorised user. McCarthy refers to a similar analogy drawn by Justice Cobb, whereby the unauthorised use of image enslaves the individual: his loss of control means he is no longer free.[50]

What is particularly interesting about Spence's argument is that it is made in the context of one company passing itself off as another *juristic* person, yet it can be applied to the use of an individual's brand (his image and identity) as well. Where this happens, the individual has lost control of his image and identity and thus his autonomy is infringed, because he is used to convey the message of another party without his consent or control. Further, although passing off is traditionally seen as an action to protect the economic interests of the trader, Spence's arguments here reveal the dignitarian interests that are also present in a

[47] M Spence, "Passing off and the misappropriation of valuable intangibles" (1996) 112 LQR 472.
[48] *Ibid*., at 497.
[49] *Ibid*., at 498.
[50] JT McCarthy, *The Rights of Publicity and Privacy* (2nd ed, 2001), para 2:5, and references therein.

misrepresentation of the company through misuse of its trade mark. These arguments, made in the context of passing off disputes between companies, arguably apply with even greater force in the case of publicity rights, where the subject of the misrepresentation is a natural person whose very identity is being abused and misappropriated.

Nonetheless, it is difficult to accept that there is much in common between celebrities and victims of torture throughout the world. While the analogy between torture and passing off put forward by Spence is thought-provoking, it is too extreme to command much sympathy in this context. Its underlying message can instead be applied through a less emotive analogy.

The real harm done in such cases, Spence argues, is the unauthorised use, and consequent suppression, of someone else's voice. This results in harm both to the individual (or company) *and* to the society which receives the "untruthful" message. A similar, yet less extreme, analogy for the suppression of voice and subsequent harm can be found in the right to vote.[51] This is an intangible right of every adult, and is recognised as fundamental in a democratic society. The unauthorised "use" of someone else's vote would deprive that individual of his voice in a democratic society and be an affront to his autonomy. If an individual's vote were to be commandeered or confiscated, harm would be done to the individual and to the wider society and the process of democracy. Not only would the individual have lost his voice and, consequently, his ability to speak on his own behalf and his autonomy, but society's interest in truthfulness (and democracy) would also be tarnished if it failed to stop the misuse.

This concept of using the identity of another to deceive can also be found in Logeais' analysis of the French image right. She states:

> fame is best conveyed through the name or picture which are inherent to the person and therefore their use or perfect imitation makes identification certain. *Because these intrinsic "marks" are so personal and inseparable from the person, their use implies some necessary deliberate involvement of the person, that is, the likelihood of deception or implied endorsement*, unless the use is too blatantly inconsistent with their status or position to imply a likely consent on the part of the celebrity.[52]

[51] Many local authorities encourage their residents to join the Electoral Register with phrases such as "Don't lose your voice – register to vote" and "Make your voice heard". There is a clear link between voting and voice in Western democracies.
[52] E Logeais, "The French Right to One's Image: a Legal Lure?" (1994) *Ent LR* 163, at 169, emphasis added.

This echoes Spence's concern that, unless the use is blatantly false, it is potentially deceptive and harmful to society and to the individual.

The conclusion that can be drawn from this brief review of autonomy and image is that the right to control the use of one's image and identity is essential in any society which professes to respect dignity and autonomy. Failure to protect this harms the individual and society as a whole. In addition, where use of publicity remains unregulated, individuals and potential users are also harmed through the lack of legal certainty. Absent a specific right, with a clear scope and limits, users are deprived of possible permitted uses and defences which might otherwise be available to them. Where individuals choose to litigate based on the nearest available doctrine – such as passing off or privacy – they are deprived of a right which meets their needs, while the defendant is of course deprived of defences which may well be relevant in a publicity situation. Whether one agrees with the practice of publicity exploitation or not, it is surely the case that a legal right which is framed to limit the scope of control and provide for allowed uses of image and identity, is to be preferred to the unregulated status quo.

Although a statutory right of publicity in the UK remains an improbable (if not impossible) outcome at present,[53] is it not inconceivable that at some point in the future Prince William may find himself giving Royal Assent to a statute regulating publicity exploitation – including, of course, the merchandising of royal weddings.

[53] Huw Beverley-Smith, for example, comments on the "preponderance of opinion [which] suggests that any initiative in protecting interests in personality which do not fall under the existing heads of liability will be judicial rather than legislative". H Beverley-Smith, *The Commercial Appropriation of Personality* (CUP, 2002), at 328.